Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

ROBERT D. CUNNINGHAM JR.
Petitioner,

v.

CARMEN R. NAZARIO,
STATE OF DELAWARE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Defendants

and

Charles Konigsberg
Defendant

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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March 25, 1998

98-PP

QUESTIONS PRESENTED

The case centers around Part H of the Individuals with Disabilities Education Act, which mandates the identification and provision of early intervention services to children age 0 through 3 who either have, or are at risk for, developmental disabilities such as mental retardation, cerebral palsy, or autism.

I. Does ordering a physician to withhold diagnostic information from the families of handicapped children violate the First Amendment protection of the physician-patient relationship? Can a physician be required to give up the First Amendment protection usually given to the physician-patient relationship as a condition for gaining employment?

II. Does ordering a physician to withhold diagnostic information from the families of handicapped children violate the constitutionally guaranteed right to privacy of the physician-patient relationship? Can a physician be required to give up the constitutional protection usually given to the privacy of the physician-patient relationship as a condition for gaining employment?

III. Does ordering a physician to withhold diagnostic information from the family of a handicapped

child, for the reasons that the family may become alarmed, or because the family thus empowered with this knowledge will seek out additional services that the government has been mandated to pay for, constitute a form of discrimination against the handicapped in violation of Section 504 of the Rehabilitation Act of 1973?

IV. Does ordering a physician to withhold diagnostic information from the family of a handicapped child violate the informed consent requirements of 34 CFR § 303.404 and 34 CFR § 303.344? May failure to obtain informed consent as mandated by 34 CFR § 303.404 and 34 CFR § 303.344 be considered a form of medical malpractice under Del C 18 § 6801 (7)?

V. Does a physician who is refused re-employment on the grounds that he refuses to withhold diagnostic information from the families of handicapped children have the right to file a complaint with the Office of Special Education of the U.S. Department of Education under 34 CFR §§ 303.510 - 303.512? If there is a failure to resolve the complaint under 34 CFR §§ 303.510 - 303.512, does he have the right to file suit under 34 CFR § 303.424?

VI. If a party refuses to comply with the complaint resolution procedures under 34 CFR §§ 303.510 - 303.512,

can a third party suit be filed to force compliance with the complaint resolution procedures under 34 CFR § 303.424?

VII. Complaints cannot be filed under 42 U.S.C.S. § 1983 until all administrative remedies are exhausted. Where a claim can be decided under the Individuals with Disabilities Education Act (IDEA), no separate 42 U.S.C.S. § 1983 claim can be filed, and administrative remedies under IDEA must be exhausted before filing a 42 U.S.C.S. § 1983 claim. The statute of limitations for 42 U.S.C.S. § 1983 is two years. Is the statute of limitations for 42 U.S.C.S. § 1983 action tolled when efforts to resolve the complaint through the administrative process described in IDEA drag on for longer than two years?

VIII. Complaints cannot be filed under 42 U.S.C.S. § 1983 until all administrative remedies are exhausted. The Merit Rules covering Delaware state employees contains a process for the resolution of grievances based on discrimination arising from non-merit factors. When efforts to gain administrative resolution of a discrimination complaint through the Delaware state employees Merit Rules drag on for longer than two years, in part because of non-compliance with the Merit Rules on the part of the state defendant, is the

time for filing a complaint under 42 U.S.C.S. § 1983 tolled?

IX. The Plaintiff contends that he was refused re-employment in late 1994 because he refused to withhold diagnostic information from families. Less than two years after this event, in May, 1996, the Plaintiff filed a First Amendment claim in District Court regarding this incident. Did the court err in dismissing this 42 U.S.C.S. § 1983 claim on the grounds that the two year statute of limitations had expired?

X. May a physician be retaliated against, in the form of refused employment, threatened loss of worker's compensation payments, threatened fraud investigations, and threats to suspected informants or potential witnesses for filing a complaint with Office of Civil Rights and the Office of Special Education and Rehabilitation describing possible discrimination against handicapped children? Does retaliation against a physician reporting discrimination against handicapped children violate his constitutional protection of Free Speech (42 U.S.C.S. § 1983, Title VII of the 1964 Civil Rights Act)? Does this type of retaliation violate Section 504 of the Rehabilitation Act of 1973 [34 CFR 100.7(e) incorporated in Section 504 at 34 CFR § 104.61]?

XI. Are worker's compensation payments a protected property interest under the Due Process clause of the Fourteenth Amendment? Does an employer have an obligation to remove any illegal barriers that prevent employees on worker's compensation from returning to work? Do workers on worker's compensation have standing under the Due Process clause to file suit to remove illegal barriers?

XII. Under the Delaware government's merit system of employment, the best qualified applicants are to be selected in preference to the lesser qualified. If a well-qualified applicant is passed over in favor of a lesser qualified applicant on the grounds that the better qualified applicant refuses to give up the constitutional protection of the physician-patient relationship, refuses to discriminate against the handicapped under Section 504 of the Rehabilitation Act of 1973, and refuses to commit possible medical malpractice by not obtaining informed consent as mandated by 34 CFR § 303.404 and 34 CFR § 303.344, does the position being applied for become a protected property interest under the Due Process Clause? Is there a violation of the Equal Protection Clause under the same circumstances?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Robert D. Cunningham Jr., M.D., petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The judgment of the Court of Appeals, App., infra, 1a - 4a, is unpublished. The opinion of the District Court, App., infra, 6a - 29a, is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 17, 1998, App., infra, 1a - 2a. A motion for rehearing was denied on March 16, 1998, App., infra, 3a - 4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATEMENT OF THE CASE

In 1986 Federal Public Law 99-457 was passed by Congress, mandating the establishment of diagnostic, referral, and intervention services for children in the age 0 through 3 year age range who either have, or are at risk for, handicapping conditions. Public Law 102-119 was passed in 1991 further amending the programs established under Part H of the Individuals with Disabilities Education Act. The implementing regulations are found in 34 CFR Part 303 (Early Intervention Program for Infants and Toddlers with Disabilities).

1. Facts.

The Delaware Division of Public Health (DPH), part of the Delaware Department of Health and Social Services (DDHSS), founded the Child Development Watch (CDW) program around 1986, with the intention of using CDW as a pilot program to meet the requirements of Part H. The CDW clinics were funded in part by federal grant money.

Official state-wide implementation of Part H of Public Law 102-119 did not begin until 9/30/93, although implementation in some areas of Delaware began earlier. Currently, CDW is funded in part by grants applied for through the U.S. Department of Education. As part of the condition for receiving federal money, DDHSS agrees to comply with Section 504 of the Rehabilitation Act of 1973.

In 1988, the Plaintiff was recruited by DPH to work in the CDW clinic as

a developmental pediatrician, i.e., a specialist in disabilities such as mental retardation, cerebral palsy, and autism in children. The Plaintiff discovered that the physician previously employed in the CDW clinic (a general pediatrician with no specialty training in developmental pediatrics) had implemented a policy of routinely withholding diagnostic information from families, i.e., families were not told that their children had mental retardation, cerebral palsy, or autism, even when the evaluation clearly indicated the presence of these conditions.

Upon beginning work in the CDW clinic, the Plaintiff implemented a policy of full disclosure of diagnostic information. Families of children who tested in the mentally retarded range were told about the probability of mental retardation; the families of children who were spastic were told about cerebral palsy; and the families of children with behaviors consistent with autism were told about autism.

The Plaintiff was ordered by DPH to withhold this diagnostic information from families. DPH stated that families given this information would become upset and complain to their political representatives, who would in turn complain to DPH. DPH also stated that Delaware is a poor state that could not afford the support services these families would need if full disclosure of diagnostic information was made to the families.

The Plaintiff explained to DPH that it was the medical standard of care for developmental disabilities clinics in the region to provide com-

plete disclosure of diagnostic information to families. The Plaintiff stated that he could be sued for malpractice for failing to disclose diagnostic information, especially to families who are unknowing carriers of genetic conditions that result in severe disabilities in their offspring.

Nevertheless, DPH stated that unless the Plaintiff agreed to withhold diagnostic information, he could not continue to be employed by DPH, and threatened the Plaintiff with possible termination of employment. In February, 1989, the Plaintiff wrote a letter to the head of DPH describing the situation and asking for his assistance with resolution. Although the Merit Rules (App., infra, 48a - 49a) for Delaware state that such complaints must be replied to within a fixed period of time, no response to the complaint was ever received by the Plaintiff while this Director was in office.

In March, 1989, the Plaintiff was told by his supervisors that he had no right to have sent a letter of complaint to the head of DPH. The Plaintiff was told that unless he agreed to withhold diagnostic information from families, he would be terminated. The Plaintiff submitted a letter of resignation.

The Delaware state government had in place an administrative means to resolve employee complaints, involving a step-wise progression of the complaint from lower level bureaucrats to the head of the state personnel office to the State Personnel Commission and the director of DPH.

The Plaintiff was at an impasse

in resolving the conflict with his immediate supervisors. In April, 1989, the Delaware state personnel director stated to the Plaintiff that, although according to the grievance rules he had responsibility for resolving the complaint, he felt uncomfortable becoming involved because the complaint centered on a question of medical practice beyond his expertise. He also stated that the State Personnel Commission was likely to encounter the same problems with trying to resolve the complaint. He suggested continued negotiations between the Plaintiff and his supervisors. But such talks continued at an impasse, and no response from the Director of DPH was forthcoming.

Before his resignation took effect, the Plaintiff was severely injured in an automobile accident while en route to a CDW clinic. Despite the letter of resignation, the Plaintiff returned to work in the CDW clinic in June, 1989, on a part-time basis. A supervisor asked the Plaintiff to continue to work in the clinic after June, 1989, but again insisted that the Plaintiff withhold diagnostic information from families. The Plaintiff again indicated that the practice was unethical, and stopped all work for the CDW program at the end of June, 1989.

In July, 1989, the Plaintiff was contacted by the state's worker's compensation administrators and asked why he was no longer working. The Plaintiff stated that he was no longer working not because he was physically unable to, but because he was refusing to comply with DPH's request to withhold diagnostic information, which the Plain-

tiff felt was unethical and possibly illegal. The worker's compensation administrator discussed the situation internally and decided to keep the Plaintiff on worker's compensation until such time that the Plaintiff began working again and earning a salary comparable to what he was making before he was injured in the automobile accident. The worker's compensation payments continued until March, 1995.

From July, 1989, onwards, the CDW clinic employed a variety of general pediatricians to staff the CDW clinic. The pediatricians were sometimes direct employees of the state government, and sometimes were employed as private contractors. None of the general pediatricians had completed a formal fellowship training program in developmental disabilities. From July, 1989, onwards, the CDW clinic continued a policy of withholding diagnostic information from the families of children with mental retardation, cerebral palsy, and autism.

From 1989 through 1992, the Plaintiff would occasionally meet with the CDW clinic administrators and the possibility of the Plaintiff returning to work for the CDW clinic was touched upon. In 1993, the Plaintiff was specifically asked to cover the CDW clinic on a part-time temporary basis for the months of July and August, 1993, as a private contractor. In a meeting with the clinic administrator held in July, 1993, the Plaintiff was again told that the CDW clinic's policy was to withhold diagnostic information from families. The Plaintiff again stated that the withholding of diagnostic information was unethical and could result

in the Plaintiff being sued for medical malpractice. Papers were drawn up, and the Plaintiff was told that DPH would get back to him if the papers were approved. The next day, the Plaintiff was told by DPH that his services would not be needed after all; a pediatrician had just been hired to cover CDW on a full-time, permanent basis.

In August, 1993, the Plaintiff found out that no such person had been hired; some of the CDW clinics were being conducted without physician coverage for lack of physician availability, despite the fact that the Plaintiff was still continuing to worker's compensation, and was available and able to provide clinic coverage. In August through October, 1993, the Plaintiff wrote a series of letters of complaint to DPH and DDHSS, including letters to the two individually named defendants, protesting both the withholding of diagnostic information from families of handicapped children, and discrimination in employment against the Plaintiff. At the request of the defendant, Charles Konigsberg, in October, 1993, the Plaintiff met with a DPH-employed physician to discuss his concerns. Although the physician told the Plaintiff that he would look into things and get back to the Plaintiff, the Plaintiff never heard from him again.

In November, 1993, the Plaintiff contacted the Delaware Department of Justice to ask if they had jurisdiction to investigate his discrimination complaints. In January, 1994, a DPH employee warned the Plaintiff to remember that he "is little and the state is big and can strike back" at him. The

remark seemed calculated to dissuade the Plaintiff from pursuing his complaints any further. In February, 1994, the Plaintiff met with a Delaware deputy attorney general to describe his concerns. The Delaware deputy attorney general stated that the Delaware Department of Justice could investigate such matters and that there was no need to involve the federal government. The next day, the same Delaware deputy attorney general, who also acts as the representative for DDHSS in civil litigation, called the Plaintiff at home and appeared to imply that the Plaintiff's worker's compensation payments would be cut off if he pressed forward with his complaints regarding the CDW program.

In February, 1994, as a consequence of the threat from the Delaware Department of Justice, the Plaintiff sent a letter of complaint to the Office of Civil Rights of the U.S. Department of Justice asking if they had jurisdiction over the complaint. In the summer of 1994, the complaint was forwarded to the Office of Civil Rights of the U.S. Department of Health and Human Services. Later during the same year, the complaint was forwarded to the Office of Special Education and Rehabilitative Services (OSER) of the U.S. Department of Education. In correspondence with the Plaintiff, OSER stated that they had jurisdiction over the portions of the Plaintiff's complaint relating to the implementation of Part H (App., infra, 30a - 31a).

Around the end of May, 1994, the Plaintiff was again reminded by a DPH employee that he may be in trouble with

the Delaware Department of Justice, for reasons left unspecified.

Also, around the end of May, 1994, a pediatrician working in the CDW clinic abruptly resigned. (At a later time she met with the Plaintiff and stated to him that among the reasons she quit was that she was feeling accused by the Defendant, Charles Konigsberg, of giving the Plaintiff information about the illegal withholding of diagnostic information in the CDW program. She also stated that she had been physically assaulted by a supervisor.) When the Plaintiff heard about the vacancy (August, 1994), the Plaintiff phoned the office of the Defendant, Carmen R. Nazario, and was told that a pediatrician was definitely needed to staff the clinic, and was asked if he was volunteering to fill the vacancy. The Plaintiff explained that he was interested in filling the vacancy, that he was still receiving worker's compensation payments paid for by the state government, but that he still had concerns about the withholding of diagnostic information from families.

The Plaintiff made several follow-up phone calls to the same office, and eventually was asked to meet with a DPH-employed physician to voice his concerns. The physician verified that DPH would be filling the vacancy, but had not yet decided on the specifics (part-time or full-time; direct employee or private contractor). The physician stated that he would visit the CDW clinic to look into the Plaintiff's concerns, and then meet back with the Plaintiff. At the follow-up meeting in October, 1994, the physician refused to answer

any and all questions regarding the CDW program, and requested the opportunity to consult with the Delaware Department of Justice. The physician also declined to discuss re-employing the Plaintiff. Follow-up phone calls by the Plaintiff to Carmen R. Nazario's office were ignored.

In January, 1995, the Plaintiff confronted the Defendant, Carmen R. Nazario, with his concerns at a public meeting. Shortly afterwards the Plaintiff discovered that another general pediatrician had been hired as a full-time employee to cover the CDW clinics. Carmen R. Nazario agreed to arrange a meeting for the Plaintiff to voice his concerns. At the meeting in February, 1995, the representatives of the Delaware state government again refused to answer any and all questions regarding the CDW program and refused to discuss the employment discrimination against the Plaintiff. The Plaintiff was asked to file yet another written complaint with DDHSS.

In March, 1995, the Plaintiff filed the written complaint with DDHSS, simultaneously sending a copy of the complaint to the Office of Special Education and Rehabilitative Services (OSER) of the U.S. Department of Education. In response to the complaint, OSER instructed the Defendants to respond to the Plaintiff's complaint, citing the guidelines described under 34 CFR §§ 303.510 - 303.512 (App., infra, 46a - 47a).

The response the Plaintiff received from Carmen R. Nazario was evasive and ignored the bulk of the complaint. In June, 1995, the Plaintiff requested

Secretarial review from OSER under 34 CFR § 303.512. (Also, in March 1995 the Plaintiff filed a complaint with Delaware's Merit Employees Relations Board, and the complaint was ultimately dismissed as untimely according to Delaware's Merit Rules. The dismissal on the grounds of untimeliness was upheld upon appeal.) In March, 1996, OSER again instructed the Defendants to resolve the complaint in a sixty day time period. The Defendants refused to meet with the Plaintiff to discuss the complaint and to hear directly from CDW clinic employees about the practice of withholding diagnostic information. As a result, the Plaintiff filed another complaint with OSER.

Two years after the Plaintiff had initiated the administrative complaint process at the federal level, the complaint was still under consideration by OSER with no end to the process in sight. Since 34 CFR Part 303 covers the informed consent process, the Plaintiff would not be able to file suit in federal court to get a declaration of the protection of the informed consent process under 42 U.S.C.S. § 1983 (App., infra, 39a) without first receiving permission to file suit from the appropriate administrative agencies.

In phone call conversations in May, 1996, with both OSER and the Office of Civil Rights of the U.S. Department of Justice, both agencies agreed to put in writing that they did not have jurisdiction over the civil rights aspects of the Plaintiff's complaint. The Plaintiff's current suit was then subsequently filed in May, 1996.

In a letter to the Plaintiff dated June 6, 1996, (App., infra, 32a - 34a) OSER states that the Plaintiff could file suit in court for resolution of the complaint under the First and Fifth Amendments in a 42 U.S.C.S. § 1983 action. In the same letter, for the first time OSER suggested that the Plaintiff contact the Office of Civil Rights within the U.S. Department of Education regarding possible civil rights violations.

In June, 1996, the Plaintiff discussed the civil rights issues with OCR, Department of Education, over the phone and was told that complaints of violations of Section 504 of the Rehabilitation Act of 1973 could be filed directly in court. The Plaintiff filed a written complaint with OCR, Department of Education, and filed an amended complaint in District Court, adding allegations that Section 504 of the Rehabilitation Act of 1973 had been violated. In a letter dated August 2, 1996, (App., infra, 35a - 37a) OCR, Department of Education, states that OCR will stay any administrative action regarding the Plaintiff's Section 504 complaint pending any court decision.

In papers filed with U.S. District Court in October, 1996, the Delaware deputy attorney general representing the Defendants threatened the Plaintiff with a fraud investigation for receiving worker's compensation payments despite being well enough to work. This was the type of threat the Plaintiff had previously attempted to warn the Office of Civil Rights of the U.S. Department of Justice about in February, 1994, when a Delaware deputy attorney general

made implied threats that the Plaintiff's worker's compensation payments would be cut off if the Plaintiff pressed forward with his complaints.

On March 31, 1997, the U.S. District Court for the District of Delaware dismissed the Plaintiff's complaint. A motion for reargument was filed and dismissed on August 29, 1997, after the admission of an amended complaint. A subsequent motion for reargument was denied on September 25, 1997.

A timely appeal was filed and dismissed by the U.S. Court of Appeals for the 3rd Circuit on February 17, 1998. A motion for reargument was denied on March 16, 1998.

2. Jurisdiction of the District Court

This case involves violations of constitutional rights (App., infra 38a - 39a) which can be pursued as violations of 42 U.S.C.S. § 1983 (App., infra, 39a), education laws written under the authority of 20 U.S.C.S. §§ 1400 et seq (App., infra 42a - 47a), and civil rights laws written under the authority of 29 U.S.C.S. §§ 790 et seq (App., infra, 39a - 42a).

In a disputed point, the Plaintiff maintains that the District Court had jurisdiction of this case pursuant to 34 CFR § 303.424 (App., infra, 45a) written under the authority of 20 U.S.C.S. §§ 1400 et seq, which gives authority to U.S. District Court to hear third party complaints filed under 34 CFR § 303.424 when there is a failure to resolve the complaint administratively under the process described under 34 CFR § 303.512 (App., infra 46a - 47a).

28 U.S.C.S. § 1331 gives U.S. District Court jurisdiction over the described matters.

REASONS FOR GRANTING THE PETITION

Importance of the case

In this era of managed health care, there is a strong incentive for cost containment. Physicians, historically self-employed and free to put the needs of the patients ahead of concerns of cost containment, are now more likely to be employed by large private employers or the government. In this relatively new situation, physicians find themselves under increasing pressure to keep costs down; but cost containment can come into direct conflict with the existing medical standard of care. Physicians are now coming under pressure to withhold information from patients, information that is vital to the patient's right of self-determination to seek appropriate health care services and the patient's ability to provide an informed consent to receive these services.

The intent of P.L. 99-457 and P.L. 102-119 is to identify children who either have, or are at risk for developing, handicapping conditions as early as possible in order that they may be enrolled in early intervention programs that may ameliorate the adverse impacts of these conditions. Among the early interventions that may be recommended include physical therapy, speech therapy, occupational therapy, and special education services. These services are labor intensive and costly to provide. And

to a large degree they must be financed by government money raised through taxes.

Sometimes the conditions identified are severe disabilities: mental retardation, autism, cerebral palsy. For many parents, these are emotion-laden terms. And as is the case when any serious medical diagnosis is made, there is sometimes a tendency on the part of the patient or the patient's family of denial and anger toward the party making the diagnosis. When this type of anger occurs in a government-operated program, it makes politicians and bureaucrats exquisitely nervous.

Despite the anger that making a serious diagnosis of a disability in a child may trigger, a report issued in October, 1981, by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research found that most members of the public do not wish to have "bad news" withheld from them. The Commission concluded:

> The ethical foundations of informed consent can be traced to the promotion of two values: personal well-being and self-determination. To ensure that these values are respected and enhanced, the Commission finds that patients who have the capacity to make decisions about their care must be permitted to do so voluntarily and must have all relevant information regarding their condition and alternative treatments, including possible benefits, risks, costs, other consequences, and significant

uncertainties surrounding any of this information.

Failure to obtain appropriate informed consent can be prosecuted under 18 Del. C. § 6852 (App., infra, 48a) as malpractice. In regards to the programs established under Part H, 34 CFR § 303.401 (App., infra, 44a) defines informed consent as meaning that the parent has been fully informed of all information relevant to the activity for which consent is sought. Under 34 CFR § 303.404(a)2 (App., infra, 45a) written parental consent must be obtained before initiating the provision of early intervention services. A recent study of families with handicapped children in Delaware revealed that the vast majority of families do not want diagnostic information withheld from them; they want to know the diagnosis of the condition in their child as soon as it is known to the physician, or even when the condition is only suspected.

This puts the physician in a bind: Medical ethics and the law demands that he not withhold information from families, while corporate administrators, bureaucrats, and politicians are also telling him not to do anything that will upset families.

And the bind that physicians find themselves in is even worse than this. Providing services to handicapped children is expensive. Providing a full disclosure of diagnostic information to the family of a handicapped child is likely to increase the demand for services. Although having a specific diagnosis is not required in order to qualify for services, families of

handicapped children who have had diagnostic information withheld from them are less likely to seek out appropriate services than families to whom a complete disclosure of diagnostic information has been made. So there is an economic incentive for corporate administrators, bureaucrats, and politicians to pressure physicians to withhold diagnostic information from families.

Is there any data suggesting that withholding of information is occurring on a large scale basis? Based upon population statistics, approximately 2.5% of the U.S. population has an IQ in the mentally retarded range. Accordingly, in Alabama about 2.5% of public school children between the ages of 6 and 21 are identified as being mentally retarded. But in Delaware, only about 0.9% of public school children are identified as mentally retarded. This is 40% of what is expected, and suggests that there are approximately 1300 public school students with mental retardation who may not be receiving the services they are legally entitled to.

Delaware is not unique in its suspiciously low incidence of mental retardation among public school children. Several other states also have suspiciously low incidences.

The withholding of diagnostic information not only impacts the provision of educational services, but impairs medical care as well. Many children with mental retardation, autism, and cerebral palsy have genetic disorders that are the cause of their disabilities. Often, the parents of these children are asymptomatic and unknowing carriers of defective genes that are the etiologic

agents of these conditions. These silent carriers are at risk for giving birth to additional children affected by the same disabilities. These silent carriers can be detected by laboratory testing and given the opportunity for prenatal diagnosis if the mother subsequently becomes pregnant again. But this type of testing will not occur if the diagnosis of the condition of mental retardation, cerebral palsy, or autism is never made.

Failure to diagnose readily identifiable genetic syndromes that result in disability is malpractice, especially when the affected family gives birth to subsequent affected children. So again, the physician is in a bind: Providing complete disclosure of diagnostic information will result in an increased demand for services that a school system or health care provider will be obligated to pay for. Withholding such information as a result of being pressured by a health care administrator, bureaucrat, or politician not only results in impaired services to the physician's patients but places the physician at risk for malpractice action against him.

Who is the victim here? Obviously disabled children and their families are victims. But so are the physicians, especially if they are honest and refuse to comply with illegal directives to withhold diagnostic information. These honest physicians who insist upon doing the right thing become the targets of threats and forced unemployment. In the case of the Plaintiff, a specialist in the evaluation of developmental disabilities in children, he has spent

nine years in training, training that was subsidized by federal government money, in order to work in a clinic that specializes in the diagnosis of handicapping conditions in children. If he is prevented from providing diagnostic information to families, then he cannot function as a developmental pediatrician, and his years of training, and much money, has been wasted.

The decision below court contradicts previous U.S. Supreme Court decisions regarding protection of physician's First Amendment rights, and decisions of other appeals courts regarding the physician's constitutional right to practice medicine

In its decision Rust v. Sullivan [111 S.Ct. 1759; 500 U.S. 173; 114 L.Ed2d 233 (1991)], the Supreme Court put forth a doctrine of what is and what is not covered by First Amendment protection in the physician-patient relationship: the government has the right to determine what services are offered. Any speech necessary to the provision of these services is protected by the First Amendment. Medical ethics, as previously described in the 1981 report by the President's Commission, demands that full disclosure of diagnostic information be made.

One test for determining what is and what is not covered under the informed consent doctrine is whether the information provided to the patient might reasonably be expected to influence the patient in his selection of and consent for services. If, for example,

the parents of a child who tests in the mentally retarded range is given the diagnosis of learning disability instead of mental retardation, then the consent given by the family for services would not be an informed consent by this test, because experts in special education generally recommend different interventions for the two conditions and the parents would be left unaware of this. Also, the medical standard of care for the evaluation of the two conditions is different.

A second criterion to be considered is whether the family desires the information, as opposed to whether the care provider believes the information should be supplied. It is the family's desire for the information that is the overriding concern: if the family believes the information is relevant, then the information should be supplied. (Canterbury v. Spence, C.A. 464 F.2d 772, 780; 150 U.S.App.D.C. 263).

The District Court's opinion in the present case regarding the question of whether accurate diagnostic information should be provided to the families of handicapped children appears to have been arbitrarily made, and is contradicted by the rules for informed consent spelled out in numerous other cases.

Providing diagnostic information to patients is truly a public concern. The First and Fourteenth Amendments (App., infra, 38a) protect public employees from being discharged in retaliation for speaking out, provided that the speech claimed to be protected deals with matters of true public concern as opposed to matters of purely personal interest [Caine v. Hardy 943 F2d 1406

(5th Cir. 1991)].

In addition, the courts have the power under 42 U.S.C.S. § 1983 to issue orders or injunctions restricting agencies from engaging in prospective unconstitutional behavior. Jones v. Michigan (1981, ED Mich) 525 F. Supp. 636, affd without op (1982, CA6 Mich) 705 F2d 454. This ruling should allow applicants and prospective employees to challenge restrictions of civil rights that are being made as part of a job requirement as unconstitutional.

Furthermore, the District Court based it decision on a faulty statement of the law: First and Fourteenth Amendment protection is afforded only to current employees, actively engaged in seeing patients. But more accurately, according to a recent Supreme Court decision, 42 U.S.C.S. § 1983 applies not only to current employees, but also to former employees and to applicants for employment (Robinson v. Shell Oil Co., 65 LW 4103, 2/18/97).

Providing complete diagnostic information to families in order to obtain fully informed consent is part of the services mandated under Part H, and is therefore constitutionally protected. The Defendants cannot ask applicants to waive the constitutional protection afforded to the physician-patient relationship as a condition for employment [Rust v. Sullivan, 111 S.Ct. 1759; 500 U.S. 173; 114 L.Ed2d 233 (1991)].

In August through October, 1994, the Plaintiff was both a former employee, still receiving worker's compensation payments from the Defendants, and an applicant seeking to fill a vacancy--a

vacancy created when a second CDW physician resigned after feeling accused by the Defendants of passing the Plaintiff information about the illegal policy of withholding information from patients. The Plaintiff contends that he was denied consideration for this job because he refused to give up his constitutional protection, and because he had already filed complaints about the CDW clinic's illegal policy.

The District Court erred in stating the statute of limitations for claims under 42 § U.S.C.S. § 1983.

With regards to an alleged incident of discrimination occurring in August, 1994, the statute of limitations for a 42 U.S.C.S. § 1983 action would not expire until August, 1996, at the earliest. The Plaintiff's instant suit was filed in May, 1996.

The Delaware Merit Rules contains a policy regarding the handling of complaints of discrimination against state employees and applicants based on non-merit factors, which would include discrimination on the basis of refusing to give up a constitutionally protected right. According to Kramer v. Horton (1986) 128 Wis2d 404; 383 NW2d 54; cert den (1986) 479 US 918; 93 LEd 2d 296; 107 SCt 324, and United Auto. Aerospace & Agricultural Implement Workers v. State Farm Mutual Auto. Ins. Co. (1972, ND Ill.) 350 F. Supp. 522, before a 42 U.S.C.S. § 1983 claim can be filed, the state's administrative procedures have to be followed until such a point is reached that it appears a resolution through this procedure

is unlikely. The Plaintiff contends that he began the administrative complaint process all the way back in 1988, and the process did not end until the Delaware Supreme Court denied his appeal in June, 1996. The issue of the effect of the drawn out administrative complaint process has on the statue of limitations for § 1983 claims was raised but never addressed in the lower courts.

The courts have no jurisdiction over actions taken by either the Office of Special Education and Rehabilitative Services nor the Office of Civil Rights

In 1994 the Plaintiff filed a complaint with the Office of Civil Rights of the U.S. Department of Justice describing the illegal policy of the CDW clinic of withholding information, and that the Plaintiff was being illegally retaliated against. During the following two years, the Plaintiff's complaint was shuffled about from agency to agency. The Office of Special Education and Rehabilitative Services (OSER) of the U.S. Department of Education has stated that they have jurisdiction over the portion of the Plaintiff's complaint regarding violations of the regulations of Part H (App., infra, 30a - 34a). And the Office of Civil Rights (OCR) has stated that they have jurisdiction over the portion of the Plaintiff's complaint that has to do with violations of Section 504 of the Rehabilitation Act of 1973 and the Civil Rights Act of 1964 (App. infra, 35a - 37a).

Neither OSER nor OCR have been

named as parties to this suit. Nor is the Plaintiff's instant suit an appeal of any administrative decision made by either of these two agencies. Therefore, the District Court acted inappropriately in stating that the Plaintiff does not have third party standing to file administrative complaints or implying that either OSER or OCR abused their discretion in granting the Plaintiff third party rights to file administrative complaints.

Because OSER stated to the Plaintiff that it had jurisdiction over the portion of the Plaintiff's administrative complaint concerning informed consent (App., infra 42a - 43a, 44a - 45a), the Plaintiff had to delay his filing of his 42 U.S.C.S. § 1983 claim, in accordance with case law [Alamo Heights Independent School District v. State Board of Education (1986, CA5 Tex) 790 F2d 1153; Association for Community Living v. Romer (1993, CA 10 Colo) 992 F2d 1040, 1 ADD 862]. The question of how this effects the statute of limitations for filing a § 1983 claim has been left unaddressed by the lower courts.

The Plaintiff asks the Supreme Court to consider that the declaration by the District Court that the Plaintiff had no standing to file administrative complaints under IDEA or Section 504 of the Rehabilitation Act of 1973, despite statements from OSER and OCR to the contrary, to be a departure from the usual and accepted course of judicial proceedings significant enough to warrant an exercise of the Supreme Court's supervisory power. As things stand now, OSER and OCR are not officially

involved in the case and are therefore free to act independently of any court decision.

The District Court misstated Section 504 of the Rehabilitation Act of 1973

The District Court stated that Section 504 of the Rehabilitation Act of 1973 (App. infra, 39a) provides protection only to the handicapped; therefore, since the Plaintiff himself is not handicapped, he does not have any rights under Section 504. The Civil Rights Act of 1964 is incorporated by reference in Section 504 at 34 CFR § 104.61 (App., infra, 41a). 34 CFR § 100.7(b) (App., infra, 40a) gives the Plaintiff authority to file third party administrative complaints with OCR regarding violations of Section 504. 34 CFR § 100.7(e) (App., infra 40a) forbids retaliation against employees and applicants for filing a Section 504 complaint. The whistle-blowers themselves do not have to be handicapped, just the people they are trying to protect.

In addition, the Civil Rights Act of 1964 provides protection to any individual who files a complaint, such as a 42 U.S.C.S. § 1983 action, regarding a violation of their First and Fourteenth Amendment rights. Is a forced resignation a form of retaliation? Or a denial of consideration for re-employment? A threat of termination of worker's compensation payments, or a fraud investigation, if the Plaintiff continues to press his complaints? Is the threatening or intimidation of potential witnesses or informants for

the Plaintiff a form of retaliation against the Plaintiff and a violation of either Section 504 or 42 U.S.C.S. § 1983?

These questions were never addressed by the lower court, and the Plaintiff asks that the case be remanded back to District Court for consideration of these issues. The Plaintiff suggests that the failure to address these questions warrants an exercise of the Supreme Court's supervisory authority.

Furthermore, Section 504 describes who may provide services to the handicapped. Under 34 CFR § 104.4(b)(1)(v) (App., infra, 41a) a recipient of government aid may not aid or perpetrate discrimination against the handicapped by providing significant assistance to a person that discriminates in providing a service to the handicapped in the recipient's program. Selecting physicians for employment on the basis of their willingness to withhold diagnostic information from families is the same as selecting a physician to provide services to handicapped children based upon their willingness to discriminate against the handicapped. There are two parties being illegally discriminated against here: the handicapped, and those who seek to provide service to the handicapped in the recipient's aid program but who are turned down on the grounds that they refuse to discriminate against the handicapped. Both groups of individuals are protected under this regulation. This point was never mentioned by the lower courts, and therefore the case should be remanded so that this question can be addressed.

Similarly, 34 CFR Part 303 describes not only what services are to be provided to the handicapped, but the qualifications of the personnel who may provide these services (34 CFR § 303.361 App., infra, 43a - 44a). When an applicant who meets these standards as a service provider is turned down for employment in favor of an applicant who may not meet these same standards, is the applicant the victim of discrimination under 34 CFR Part 303? Again, the question was never addressed by the lower court.

Appendix A to 34 CFR Part 104 (App., infra, 42a) describes the type of remedial action available when there has been a finding of discrimination. Actions that might be required include development of a remedial action plan and reinstatement of employees. In the instant action, the Plaintiff is seeking a comprehensive review of the CDW patient files and a vigorous attempt to locate the families of handicapped children who may have had diagnostic information withheld. The affected families could then be given the information that was previously withheld, and then be allowed the opportunity to provide truly informed consent regarding the provision of any intervention services.

The other type of remedial action available is reinstatement of employees. This does not imply that the law applies only to handicapped employees who lost their jobs because they were discriminated against, but non-handicapped employees who lost their jobs because they filed complaints on behalf of the handicapped.

A number of other questions asked have gone unresponded to

1. Under Delaware's Merit Rules system, the best qualified candidates are to be offered employment in preference to lesser qualified candidates. When a lesser qualified individual is hired in preference to a clearly better qualified individual, can the job in question be considered a protected property interest, since the better qualified individual had clear reason to expect to be chosen over the lesser? The question went unanswered by the lower courts.
2. Are worker's compensation payments a protected property interest? Does the Plaintiff have the right to file Section 504 and 42 U.S.C.S. § 1983 actions to remove an illegal barrier preventing him from gaining re-employment and getting off of worker's compensation? The lower courts have not addressed this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert D. Cunningham Jr., M.D.
Pro se Plaintiff
50 Greenway Square
Apartment M-31
Dover, DE 19904
(302)-736-0871

March 31, 1998

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7521

ROBERT CUNNINGHAM

Appellant

v.

CARMEN R. NAZARIO, Delaware Department of Health and Social Services; CHARLES KONIGSBERG

On Appeal from
the United States District Court
(D.C. Civ. No. 96-00247)
District Judge:
Honorable Joseph J. Farnan, Jr.

Submitted under Third Circuit
LAR 34.1(a)
February 4, 1998
BEFORE: GREENBERG, SCIRICA, and NYGAARD,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED and ORDERED that the orders of the district court from which the appeal has been taken, be and are hereby affirmed.

Costs taxed against appellant.

Appendix A

BY THE COURT:

/s/_____
Circuit Judge

ATTEST: /s/ P. Douglas Sisk, Clerk
DATED: Feb. 17, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7521

ROBERT CUNNINGHAM

Appellant

v.

CARMEN R. NAZARIO, Delaware Department of Health and Social Services; CHARLES KONIGSBERG

On Appeal from
the United States District Court
(D.C. Civ. No. 96-00247)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, and SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, MCKEE, AND RENDELL, Circuit Judges

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The petition for rehearing filed by the appellant, Robert Cunningham, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:
/s/_____
Circuit Judge

DATED: Mar. 16, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.
Plaintiff,

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF
Filed: August 29, 3:38 PM 1997
Clerk, U.S. District Court
District of Delaware

ORDER

At Wilmington this 29 day of August 1997, for the reason set forth in the memorandum Opinion to be issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion To Admit Amended Complaint (D.I. 85) is GRANTED

2. Plaintiff's Motion to Amend Reargument (D.I. 86) is GRANTED.

3. Plaintiff's requests for reargument (D.I. 81, 91) are DENIED.

4. Plaintiff's Motion For Relief From Judgment Or Order; Motion For Sanctions (D.I. 90) is DENIED.

5. Defendants' Motion to Dismiss Plaintiff's Amended Complaint (D.I. 8) is GRANTED.

/s/ Joseph J. Farnan Jr.
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.
Plaintiff

v.

CARMEN R. NAZARIO, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF

Robert D. Cunningham Pro Se Plaintiff.

Wendy A. Rising, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorney for Defendants.

MEMORANDUM OPINION

August 29, 1997
Wilmington, Delaware

Filed August 29, 3:39 PM, 1997
Clerk U.S. District Court
District of Delaware

/s/ Joseph J. Farnan Jr.
Farnan, Chief Judge

Presently before the Court are numerous related motions and requests for reargument, reconsideration, and relief from judgment filed by Plaintiff, Robert Cunningham, Jr., in this civil rights action against Defendants, the Delaware Department of Health and Human Services and various state officials. On March 31, 1997 the Court issued an Order (D.I. 78) granting Defendants' Motion to Dismiss Plaintiff's Complaint. On April 4, 1997, the Court issued a Memorandum Opinion (D.I. 79) explaining its reasons for the previously entered Order. In accord with the Memorandum Opinion and Order, Plaintiff's case was closed.

On April 4, 1997, the Court received a letter from Plaintiff suggesting that the Court made "an inadvertent judicial error" in its March 31, 1997 Order. (D.I. 80). Upon receipt of this letter, the Court informed the parties that it would treat Plaintiff's letter as a Motion for Reargument of the Court's March 31, 1997 Order pursuant to Local Rule 7.1.5. (D.I. 81). Thereafter, Plaintiff filed three more documents directly related to the reargument, a Motion To Amend Motion For Reargument (D.I. 86), and a Supplementary Motion for Reargument (D.I. 91).[1] Without waiting for the Court to rule on his pending motion for reargument, Plaintiff

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[1]Plaintiff has also filed discovery motions and numerous letters reiterating his position with the Court.

also filed a Motion for Relief from Judgment or Order; Motion for Sanctions (D.I. 90), in which Plaintiff reiterates a number of the arguments set forth in his reargument papers. In an effort to untangle the procedural quagmire in this case and to frame the issues that would be considered in the reargument/relief from judgment context, the Court informed the parties by letter, that it would consider Defendants' Motion to Dismiss in opposition to the Amended Complaint. (D.I. 93).

For the reasons set forth below, the Court concludes that the claims raised by the Plaintiff's Amended Complaint fail for lack of standing, expiration of the statute of limitations and failure to state a claim upon which relief may be granted. Therefore, the Court will deny Plaintiff's requests for reargument and Motion for Relief from Judgment and will grant Defendants' Motion to Dismiss Plaintiff's Amended Complaint.[2]

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[2]Following the Court's prior dismissal of Plaintiff's Complaint, Plaintiff's filings indicate that he was unclear as to the status of various motions that the Court dismissed as moot. In order to prevent that confusion, the Court here notes that upon dismissal of the Amended Complaint, Plaintiff's case in the District Court will be closed. Because this dismissal is a final order, Plaintiff is, of course, free to file an appeal with the United States Court of Appeals

BACKGROUND

On May 14, 1996, Plaintiff filed a Complaint (D.I. 1) against DHHS and Secretary Carmen Nazario, seeking a preliminary injunction to correct the alleged mislabeling of handicapped children by the Child Development Watch Clinic ("Child Watch"), a state agency run by DHSS. On July 2, 1996, Plaintiff filed an Amended Complaint (D.I. 16). In addition to providing more factual background, Plaintiff's Amended Complaint (1) names Charles Konigsberg, director of Public Health, as an additional defendant; (2) adds a cause of action under Section 504 of the Rehabilitation Act of 1973; and (3) seeks $600,000 in damages from Defendants Konigsberg and Nazario for Plaintiff's alleged loss of ability to obtain employment in Delaware and for the anguish Plaintiff suffered in attempting to preserve his rights and the rights of children with disabilities and their families. Because the Court informed the parties that it will rely on the Amended Complaint in the context of the instant motions, the Court derives its factual background entirely from the Amended Complaint.

From July 1988 through June 1989, Plaintiff, a developmental pediatrician, was employed at the Child Watch Clinic in Milford, Delaware. During his employment, Plaintiff claims the staff and pediatricians incorrectly labeled children with cerebral palsy, autism,

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for the Third Circuit, if he disagrees with Court's decision.

or mental retardation with the such general terms as "developmentally delayed" or "learning disabled," rather than with the most specific diagnosis available.

As a result of this alleged mislabeling, Plaintiff claims that the staff pediatricians at Child Watch could be subjected to malpractice actions for failure to properly diagnose or wrongful birth actions in cases where genetic testing could have been performed to detect hereditary mental retardation. In addition, Plaintiff raises concerns about the adverse affects that this mislabeling practice could have on the families and children involved. In an effort to bring this practice to the attention of the proper personnel, Plaintiff alleges that he filed a protest letter. However, Plaintiff contends his letter was ignored. In March, 1989, Plaintiff submitted a letter of resignation, stating his intent to resign at the end of April, 1989. Prior to his resignation, however, Plaintiff alleges that he was injured in an on the job accident. Following the accident, Plaintiff returned to work on a part-time basis, but resigned permanently in June 1989.

Beginning in July 1989, Plaintiff began to receive worker's compensation payments. Plaintiff alleges that he sought re-employment with Child Watch on two separate occasions, once in July 1993 and once in June 1994. However, Plaintiff alleges that he was denied re-employment, because of his position on the mislabeling practice. Plaintiff further alleges that he drafted a complaint, outlining his attempts to return

to employment and his allegations that Child Watch was operating outside of existing laws, and submitted the complaint to the state government and the United States Department of Education.

On the state level, Plaintiff's complaint was referred to the Merit Employee Relations Board (the "Board"). After reviewing the complaint, the Board made a number of findings of fact and ultimately dismissed the complaint as untimely. Plaintiff appealed, and the Board's decision was upheld by the Delaware Superior Court and the Delaware Supreme Court.

On the federal level, Plaintiff alleges that the U.S. Department of Education instructed the state government to resolve the complaint within a sixty day time period. However, Plaintiff alleges that the state government refused to meet with him. Thereafter, Plaintiff alleges that the Department of Education informed him by letter that it did not have jurisdiction over Plaintiff's complaints, but that Plaintiff could pursue his claims in a court of law.

Subsequently, Plaintiff filed the instant action, alleging that the mislabeling practice that occurs at Child Watch results in a number of constitutional and statutory violations. First, Plaintiff alleges that the mislabeling practice violates the First Amendment. In this regard, Plaintiff argues that the free speech rights of the staff at Child Watch are violated, because the State maintains a "de facto policy" of forbidding the disclosure of precise diagnoses. In addition, Plaintiff claims that his own free speech

rights were violated when he was asked to withhold diagnostic information from families. Second, Plaintiff alleges that the mislabeling violates the privacy rights of families that utilize Child Watch by preventing them from obtaining appropriate education regarding their children's disabilities, appropriate services and support groups to help them cope with the disabilities, and the funds allocated for mentally retarded individuals through Supplemental Social Security Income.

Additionally, Plaintiff claims that because of its mislabeling practice, Child Watch violates the following six statutes: (1) 34 CFR § 303.404, which requires Child Watch to obtain written parental consent prior to initiating early prevention services, (2) 34 CFR § 303.322, which requires Child Watch to perform multi-disciplinary evaluations by qualified personnel; (3) 34 CFR § 303.521, which prohibits Child Watch from charging fees for evaluations and assessments performed; (4) 34 CFR § 303.344, which requires Child Watch to develop an individualized family plan identifying the child's risk factor or diagnosis and revealing the same to the family; (5) 34 CFR § 303.512, which requires the State to implement a grievance system for alleged violation of the Act; and (6) 34 CFR § 303.321, which requires the State to establish a comprehensive Child Find Program to identify, locate, and evaluate children eligible for services.

Lastly, Plaintiff claims that the alleged mislabeling results in violations of Section 504 of the Rehabilitation Act of 1973. According to Plaintiff,

the mislabeling of children and the withholding of the correct diagnoses results in discrimination against the handicapped, because it misleads families away from government-funded education, social and medical services. Further, Plaintiff alleges that he was discriminated against when he allegedly refused to abide by the State's discriminatory policy of mislabeling.

As relief for the above mentioned violations, Plaintiff asks the Court to order (1) Child Watch to immediately cease from withholding diagnostic information, (2) an audit and survey of Child Watch's patient files by an examiner with expertise in developmental pediatrics and a correction of the mislabeling that the examiner finds; (3) the State to purchase a conspicuous advertisement in the state newspapers apologizing to handicapped individuals for withholding information from them, (4) the State to establish a hotline for those who fear they had information withheld from them by Child Watch, and (5) the State to hire a physician with experience in childhood developmental disabilities to supervise and provide care in the Child Watch clinics. In addition, Plaintiff demands repayment of all his legal costs and damages in the amount of $600,000 against Defendants Konigsberg and Nazario, individually, for his loss of employment and for the anguish he endured in bringing his claims.

DISCUSSION

In discerning Plaintiff's grounds for reargument, the Court will rely

on Plaintiff's letter suggesting "inadvertent judicial error," his Motion to Admit Amended Complaint, his Motion To Amend Motion for Reargument and his Supplementary Motion For Reargument (collectively, the "Reargument Papers"). In the Reargument Papers, Plaintiff essentially sets forth three grounds for reargument.[3] First, Plaintiff claims that he has both individual and third party standing to sue, based on his failed attempts to obtain

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[3]In his Reargument Papers and Motion For Relief from Judgment Or Order, Plaintiff alleges that his Amended Complaint should be considered, because under Rule 15(a), Plaintiff should have been permitted to amend his pleadings once as a matter of course before a responsive pleading was served. In their Motion to Dismiss, the State Defendants state that "[b]ecause the Motion [requesting immediate closure of all Child Watch clinics] in essence amends the remedy sought in the complaint, and both the complaint and the motion are based upon the same allegedly unconstitutional practices, Plaintiff's motion is treated as an amendment to his complaint." (D.I. 8 at 1). Rather than debate whether Plaintiff had in fact amended once as a matter of course by filing his motion, and was therefore, required to seek leave of Court to amend, the Court will accept Plaintiff's Amended Complaint for purposes of the reargument proceedings. Therefore any alleged legal error caused by the Court's prior decision to strike the Amended Complaint has been avoided.

re-employment with the clinic and on his physician-patient relationship, respectively. Second, Plaintiff claims that the Court erred in denying his discovery requests, because discovery could assist him in establishing standing. Third, Plaintiff alleges that the Court should not have dismissed his Motion For Relief from Fraud as moot, and should have allowed Plaintiff the opportunity to conduct discovery on the alleged fraud.

In his Motion for Relief from Judgment or Order, Plaintiff asks this Court for relief pursuant to Federal Rule of Civil Procedure 60(b). In support of the requested relief, Plaintiff essentially reiterates his argument that the State Defendants committed fraud.

In response to these arguments[4], the State Defendants contend that Plaintiff's Amended Complaint fails to cure his lack of standing, and that

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For this reason, Plaintiff's Motion to Admit Amended Complaint (D.I. 85) will be granted.

[4]While the State Defendants have not filed any formal response briefing to Plaintiff's Reargument Papers and Motion For Relief From Judgment Or Order, the Court indicated to the parties that it would consider Defendants' Motion To Dismiss (D.I. 8) as against Plaintiff's Amended Complaint. Because the Defendant's Reply Brief In Support Of Motion To Dismiss (D.I. 50) was part of the briefing sequence that commenced with the Motion to Dismiss, the Court

discovery on the matter will not assist in curing the defect in standing. Defendants further contend that Plaintiff's claims are barred by the statute of limitations and that Plaintiff's assertions of fraud and misconduct are baseless.

I. Standing

In order for a federal court to consider the legal merits of a claim, the plaintiff must establish, as a threshold matter, that he or she has standing to sue. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). In order to establish standing, Plaintiff must satisfy three requirements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted). First, Plaintiff must have suffered "an injury in fact." Id. An injury in fact requires an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not merely conjectural or hypothetical. Second, Plaintiff must establish a causal connection between

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will consider the arguments contained in that document, as well. Lastly, in a letter dated April 17, 1997 (D.I. 88), the State Defendants responded to some of the arguments raised by Plaintiff and indicated that they wished to rely on the arguments set forth in their Opposition To Plaintiff's Motion For Relief From Fraud And Misconduct (D.I. 54). Therefore, the Court will also consider the arguments raised in these documents.

the injury and the conduct that is the subject of Plaintiff's complaint. In other words, the injury must be "fairly traceable to the challenged action to the defendant and not the result of the independent action of a third party who is not before the court." Id. Third, Plaintiff must show that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. Where, as here, standing is challenged on the basis of the pleadings, the Court will accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. See Pennell v. San Jose, 485 U.S. 1, 7 (1988) (citations omitted).[5]

In this case, the Court concludes that Plaintiff lacks standing to pursue the free speech, privacy, IDEA and Rehabilitation Act claims that he asserts on behalf of disabled children and families affected by the alleged mislabeling. Specifically, the Court concludes that Plaintiff has not satisfied the injury in fact requirement for standing. It is a basic premise of constitutional law, that Plaintiff,

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[5]In his Reargument Papers, Plaintiff argues that discovery will assist him in establishing standing, because it will show that he was actively seeking re-employment at Child Watch and that he was denied re-employment because of his position on the labeling of handicapped children. Because the Court is accepting Plaintiff's allegations as true, Plaintiff's requests for discovery are denied as moot.

himself, must have suffered the injury he seeks to redress. Here, Plaintiff seeks to redress alleged injuries to the privacy and free speech rights of third parties. Ordinarily, one may not claim standing to vindicate the constitutional rights of a third party. Powers v. Ohio, 499 U.S. 400 (1991). Therefore, under the general rule, the Court concludes that Plaintiff lacks standing to bring the instant claims on behalf of third parties.

However, there is an exception to the general principle that has become known as "third-party standing." The Supreme Court has recognized that litigants have the right to bring actions on behalf of third parties, if three criteria are met. See Powers, 499 U.S. at 413-14; Singleton v. Wulff, 428 U.S. 106, 114-15 (1976); Amato v. Wilentz, 952 F.2d 742, 747-50 (3d Cir. 1991). First the litigant must have suffered an injury in fact, which gives him or her a sufficiently concrete interest in the outcome of the dispute. Second, the litigant must have a close relation to the third party. And, third, there must exist some hindrance to the third party's ability to protect his or her own interests.

In this case, Plaintiff argues that because he has the "right to seek re-employment as a developmental pediatrician" he has the right to assert the rights of "his prospective patients." (D.I. 86). In support of this proposition, Plaintiff cites those cases in which doctors have been found to have standing to raise the rights of their female patients, in challenging statutes that restrict abortions. How-

ever, a fundamental difference between these cases and the instant case, is that in the doctor-patient cases, the doctors were employed as physicians and, as such, maintained current doctor-patient relationships, which establish the basis for the "close relationship" requirements of third party standing. See e.g. Planned Parenthood Assn. v. Miller, 934 F.2d 1462, 1465 (11th Cir. 1991) (holding that physician has standing to challenge parental notification provision on behalf of his minor patients). In this case, Plaintiff is no longer employed as a pediatrician at Child Watch. Indeed, Plaintiff voluntarily resigned from Child Watch and has been collecting worker's compensation. As such, Plaintiff is not currently practicing medicine and maintains no current doctor-patient relationships with the children and families who utilize Child Watch. Moreover, that Plaintiff may have been seeking re-employment and may have been denied re-employment because of his views about the labeling of handicapped children, does not assist him in establishing doctor-patient relationships with the children and families whom he sought to serve. The doctrine of third party standing is applied hesitantly, and the Court declines to expand the doctrine to embrace the hypothetical, "potential patients," of a doctor who is not currently practicing medicine and who maintains no current doctor-patient relationships. See Singleton v. Wulff, 428 U.S. 106, 113 (1976) (recognizing that courts proceed hesitantly when third party rights are asserted), Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277

(1984) (expressing concern over judicial expansion of third party standing). For these reasons, the Court concludes that Plaintiff has failed to establish standing to pursue the free speech, privacy, IDEA and Rehabilitation Act claims that he raises on behalf of disabled children and their families.

With regard to Plaintiff's Section 1983 claims that the State Defendants violated his First and Fourteenth Amendment rights, the issue of Plaintiff's standing is more complex. While the State Defendants argue that Plaintiff has not suffered an economic injury, because he voluntarily resigned and was collecting worker's compensation, the Court is not persuaded by this argument. If Plaintiff was denied a protected property interest when he was not re-hired, then arguably, Plaintiff would have suffered an injury sufficient to establish standing. However, an inquiry into whether Plaintiff had a legally protected property interest in being re-hired, for example, would require the Court to blend the concept of standing with a decision on the merits, and the court declines to engage in that tortured analysis.

In cases such as this, where complex standing issues are raised and demonstration of the claimed injury would be inseparable from the merits, courts have avoided the standing issue and have examined the justiciability of the claims on other grounds. See 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3531.15 (1984), Elkin v. Fauver, 969 F.2d 48, 52 & n.1 (3d Cir. 1992) (avoiding full examination

of standing requirements and proceeding to merits of claim); Coker v. Sullivan, 902 F.2d 84, 87-88 (D.C. Cir. 1990) (stressing propriety of avoiding complex standing issues where case is more simply resolved on another basis); In re Merrill Lynch Relocation Management, Inc., 812 F.2d 1116 (9th Cir. 1987) (avoiding standing issue where argument is readily disposed of on the merits); New England MultiUnit Housing Laundry Assn. v. Rhode Island Housing & Mort. Fin. Corp., 893 F. Supp. 1180, 1191 & n. 14 (D.R.I. 1995) (declining "Defendant's invitation to decide the thorny issue of whether Plaintiffs have standing to sue" and disposing of case on other grounds). Therefore, in accord with this line of jurisprudence, the Court will assume that Plaintiff has standing to assert his claims that the State Defendants violated his First and Fourteenth Amendment rights, and will examine these claims in light of the other grounds that the State Defendants raise for dismissal.[6]

II. Failure To State A Claim

Although the State Defendants argue that Plaintiff's Fourteenth Amendment claims should be dismissed for lack

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[6]Again, with regard to these claims, Plaintiff's request for discovery to assist him to establish standing will be denied as moot, because the Court will assume, without deciding, that Plaintiff does have standing to maintain these claims.

of standing, the Court believes that the State Defendant's argument is more properly characterized as seeking dismissal on the ground that Plaintiff has failed to state a claim. Although Plaintiff's claim does not articulate expressly whether his failure to re-hire claim is based upon Equal Protection or Due Process, the Court concludes that under either analysis Plaintiff has failed to state a claim for which relief can be granted. See Fed. R. Civ. P. 12(b) (6).

In order to state a claim under the Equal Protection Clause of the Fourteenth Amendment, the Plaintiff is required to allege that he was discriminated against on the basis of his membership in a protected class. In this case, Plaintiff has not alleged that his failure to be re-hired was based on any illegal or discriminatory reasons. Moreover, Plaintiff has not alleged that he is a member of any protected class, or that he was treated differently from others similarly situated on a constitutionally protected basis. See Nelson v. Payne, 827 F. Supp. 1273, 1275-76 (S.D. Tex. 1992) (holding that Plaintiff failed to establish that school's decision not to re-hire him violated the Fourteenth Amendment, where Plaintiff failed to allege discrimination on basis of membership in protected class), aff'd, 18 F.3d 935 (5th Cir. 1994). At most, Plaintiff has alleged that he was not re-hired because of his differing views on the labeling of handicapped children. Because such differences of opinion are neither illegal nor discriminatory, Plaintiff has failed to establish an Equal Protection

claim.[7]

Likewise, Plaintiff has also failed to establish a claim under the Due Process Clause, because he has failed to allege that he was deprived of a legally protected property interest. As the Supreme Court stated in Roth v. Board of Regents, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." 408 U.S. 564, 577 (1972). Such a legitimate claim of entitlement may be created by "existing rules or understandings that stem from an independent source such as state laws." Id. In this case,

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[7]In his Amended Complaint, Plaintiff states, "In essence, the Plaintiff was discriminated against when he refused directions provided by the state government that were discriminatory against the handicapped. . ." To the extent that Plaintiff's Amended Complaint can be construed to state a claim under the Rehabilitation Act or the Equal Protection Clause on the basis of discrimination against the handicapped, the Court rejects the Plaintiff's claim. Even if Plaintiff was denied employment because of his views regarding the handicapped, he was not denied employment because he was handicapped. As such, Plaintiff has failed to state a claim that he was discriminated against in violation of either the Equal Protection Clause or the Rehabilitation Act.

Plaintiff does not allege any statutory entitlement to the position he sought, nor does he allege that there was an understanding between himself and the State Defendants that he would, in fact, be re-hired. Because Plaintiff has failed to allege that he was deprived of a legally protected property interest, Plaintiff has failed to establish a claim under the Fourteenth Amendment.

III. Statute of Limitations

Plaintiff's remaining Section 1983 claim is based upon the First Amendment. In stating his claim under the First Amendment, Plaintiff alleges that during his employment at Child Watch, the State Defendants violated his freedom of speech by requiring him to withhold diagnostic information from patients. Assuming arguendo, the Plaintiff has standing to pursue this claim, the Court must dismiss Plaintiff's claim on the ground that the applicable statute of limitations for the claim has expired.

In Wilson v. Garcia, the United States Supreme Court held that, for purposes of determining the applicable state statute of limitations, Section 1983 claims should be characterized as personal injury claims. 471 U.S. 261 (1985). In Delaware, the applicable statute of limitations for personal injury actions is two years. 10 Del. C. § 8119. Therefore, Plaintiff's Section 1983 claim based upon the First Amendment is subject to a two year limitations period.

In this case, the latest possible date of the alleged violations of Plaintiff's First Amendment rights by the

State Defendants would have been June 30, 1989, the last day of Plaintiff's employment with the State. Under the applicable statute of limitations, Plaintiff should have filed the instant claim that his First Amendment rights were violated, no later than June 30, 1991. Because Plaintiff filed the instant action almost five years later, on May 14, 1996, Plaintiff's First Amendment claim is time-barred.

In an effort to overcome the statute of limitations, Plaintiff raises two arguments for tolling. (D.I. 18). First, Plaintiff raises the continuing wrong doctrine. However, Plaintiff's Amended Complaint does not allege that the State Defendants have continued to impede his speech, and therefore, the Court concludes that this doctrine is inapplicable to his claim.

Second, Plaintiff raises the argument that the statute of limitations was tolled during Plaintiff's pursuit of administrative remedies under 20 U.S.C. § 1400. In support of his argument, Plaintiff relies on the Tenth Circuit's opinion in Association For Community Living in Colorado v. Romer, 992 F.2d 1040 (10th Cir. 1993). While the Tenth Circuit recognized that "a plaintiff must exhaust administrative remedies before bringing a 42 U.S.C. § 1983 action for relief that is also available under the IDEA," this rationale is inapplicable to Plaintiff's First Amendment claim. Id. at 1044. The purpose of the IDEA is to ensure that all handicapped children have available to them. . .a free appropriate public education which emphasizes special education and related services designed

to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate the handicapped children." 20 U.S.C. § 1400(c). Redressing alleged violations of the First Amendment rights of an individual who lacks standing to raise a claim under the IDEA in the first place, is simply not within the purview of the statute. Therefore, the Court rejects Plaintiff's tolling argument, and concludes that Plaintiff's First Amendment claim is time-barred.

IV. Fraud

In his Reargument Papers and Motion For Relief From Judgment or Order, Plaintiff argues that the Court should consider the allegations of fraud and misconduct that he advanced in his previously filed Motion For Relief From Fraud And Misconduct. (D.I. 53). In these documents, Plaintiff alleges, among other things, that the State Defendants committed fraud by mischaracterizing facts and legal arguments.

Under Rule 60(b), the determination to grant or deny relief is within the sound discretion of the trial court. See 12 Moore's Federal Practice § 60.22 (3d ed. 1997); Laskey v. Continental Products Corp., 804 F.2d 250 (3d Cir. 1986). In this case, the Court has reviewed the documents submitted by the State Defendants and finds the representations contained therein to be within the bounds of zealous advocacy

and neither fraudulent nor intentionally misleading. Therefore, the Court will deny Plaintiff's allegations of fraud. Accordingly, the Court will deny Plaintiff's request for reargument, and Motion For Relief From Judgment, Motion For Sanctions to the extent that they raise the issue of fraud.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion To Admit Amended Complaint (D.I. 85) and Motion To Amend Reargument (D.I. 86) will be granted, and Plaintiff's requests for reargument (D.I. 81, 91) and Motion For Relief From Judgment Or Order; Motion For Sanctions (D.I. 90) will be denied. Accordingly, the State Defendants' Motion To Dismiss Plaintiff's Amended Complaint (D.I. 8) will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT D. CUNNINGHAM JR., M.D.
Plaintiff

v.

CARMEN R. Nazario, SECRETARY
DELAWARE DEPARTMENT OF HEALTH
and SOCIAL SERVICES,
CHARLES KONIGSBERG
Defendants.

Civil Action No. 96-247-JJF
Filed: September 25, 4:01 PM 1997
Clerk, U.S. District Court
District of Delaware

ORDER

WHEREAS, Plaintiff, Robert D. Cunningham, Jr., filed a Motion For Reargument (D.I. 110) pursuant to Rule 59(e), of this Court's Memorandum Opinion (D.I. 107) and Order (D.I. 108) denying his previous requests for reargument and granting Defendants' Motion To Dismiss Plaintiff's Amended Complaint;

WHEREAS, Plaintiff has also re-filed a Motion To Compel Production Of Documents (D.I. 111), a Motion For Trial Date And Discovery Schedule (D.I. 112), and a Motion For Order Permitting Entry On Land And Directing Production Of Personalty (D.I. 113), all of which the Court has previously denied as moot (D.I. 109);

WHEREAS, Defendants filed a letter (D.I. 114) stating their position that the Court's Memorandum Opinion has already addressed Plaintiff's substantive

contentions, that no basis for reargument exists, and that no formal response will be filed to Plaintiff's motions;

WHEREAS, the decision to grant reargument is within the discretion of the district court; see Quality Prefabrication, Inc., 675 F.2d 77, 77 (3d Cir. 1982) (citations omitted);

WHEREAS, a motion for reargument or to alter or amend judgment may be granted where there is an intervening change in controlling law, discovery of new evidence or a need to correct a clear error of law or prevent manifest injustice;

WHEREAS, the Court does not find these circumstances to exist in the instant case;

NOW THEREFORE, IT IS HEREBY ORDERED this 24 day of September 1997, that:

1. Plaintiff's Motion For Reargument (D.I. 110) is DENIED.

2. Plaintiff's Motion To Compel Production of Documents (D.I. 111) is DENIED AS MOOT.

3. Plaintiff's Motion For Trial Date And Discovery Schedule (D.I. 112) is DENIED AS MOOT.

4. Plaintiff's Motion For Order Permitting Entry On Land And Directing Production Of Personalty (D.I. 113) is DENIED AS MOOT.

/s/ Joseph J. Farnan Jr.
United States District Judge

United States Department of Education
Office of Special Education and
Rehabilitative Services
600 Independence Avenue, S.W.
Washington, D.C. 20202

Robert D. Cunningham Jr., M.D.
50 Greenway Square
Apartment M-31
Dover, Delaware 19904

Dear Dr. Cunningham:

This is in response to your letter to Judith Heumann, the Assistant Secretary for Special Education and Rehabilitative Services, in which you request a Secretarial review of the Delaware Department of Health and Social Services' Decision on a complaint you filed with that agency.

The complaint provisions applicable to Part H of the Individuals with Disabilities Education Act (Part H) at 34 CFR §§ 303.510 - 303.512, provide that, after a complaint has been filed with the State and the State has acted on it, a party to the complaint may request that the Secretary of Education review the State's final decision. Pursuant to these regulations, the Secretary exercises this responsibility on a discretionary basis; that is, the Secretary has the authority to grant or deny the request for review.

The Secretary has designated the responsibility for administering Part H to the Assistant Secretary for Special Education and Rehabilitative Services. Included within this is the responsibility for determining whether to grant or deny requests for Secretarial review

of issues involving Part H.

Once the review of the documents that you have submitted for Secretarial review is completed, the Assistant Secretary will inform you as to whether your request for Secretarial review has been granted or denied.

A copy of the Part H regulations and a copy of OSEP memorandum 95-2, regarding the Secretarial review process are enclosed for your information. The complaint provisions can be found on page 40978 of the regulations. Although OSEP memorandum 95-2 addresses complaints involving Part B of the Individuals with Disabilities Education Act that are filed with State educational agencies, the process outlined is applicable to complaints filed with Part H lead agencies regarding a State's Part H program. If you have any questions regarding the Secretarial review process, please contact Dr. Marlene Simon at (202) 205-9089.

Sincerely,
/s/ Thomas Hehir
Director
Office of Special
Education Programs

Enclosures

cc: Carmen R. Nazario
Secretary
Department of Health and
Social Services

United States Department of Education
Office of Special Education and
Rehabilitative Services
600 Independence Avenue, S.W.
Washington, D.C. 20202

Robert D. Cunningham Jr., M.D.
50 Greenway Square
Apartment M-31
Dover, Delaware 19904

June 4, 1996

Dear Dr. Cunningham:

I am writing in response to your letter of March 8, 1996, to Assistant Secretary of the Office of Special Education and Rehabilitative Services, Judith E. Heumann.

As you know, in accordance with the requirements of Part B of the Individuals with Disabilities Education Act (IDEA), we referred your complaints to the Delaware Department of Public Instruction (DDPI) and requested that DDPI resolve allegations that the State has not met the requirements of Part B of IDEA. You requested a Secretarial review of DDPI's resolution of your complaints, and the Assistant Secretary subsequently informed you of her decision to deny your request.

We also referred your complaint to the Delaware Department of Health and Human Services (DDHHS) and requested that DDHHS resolve allegations that the State has not met the requirements under Part H of the IDEA. You requested a Secretarial review of DDHHS' resolution of your complaints, and the Assistant Secretary subsequently informed you

of her decision to remand the complaint to DDHHS.

The Office of Special Education Programs (OSEP) has authority to require the State to resolve your allegations of the IDEA and to review the State's decision, and has exercised that authority. OSEP does not have authority to resolve allegations that do not come within the purview of IDEA. We have communicated with the Department of Justice, United States Attorney's Office, District of Delaware, and confirmed that, contrary to the assertions in your March 8 letter, your complaint was referred to the Department, not because the Department was the appropriate agency to deal with all claims raised by you, but because the bulk of your complaints concerned the statute administered by OSEP--IDEA. Your allegations concerning First and Fifth Amendment violations, failure to report suspected cases of child abuse, and obstruction of justice are not within the jurisdiction of the Department. Of course, you may always pursue those allegations in a court of law.

The Office for Civil Rights of the Department does administer Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of disability. Because you make claims that you were retaliated against because of your complaints concerning alleged discrimination against persons with disabilities, you may want to contact the following Office for more information regarding your rights under that statute:

Office for Civil Rights,
Region III
United States Department of
Education
3535 Market Street
Philadelphia, Pennsylvania 19104
(215) 596-6794

I hope that this information will be of assistance to you.

Sincerely,
/s/ Thomas Hehir
Director
Office of Special
Education Programs

U.S. Department of Education
Office for Civil Rights
3535 Market Street, Room 6300
Philadelphia, Pennsylvania 19104-3326

In response, please refer to: 03964035

Dr. Robert D. Cunningham, Jr.
50 Greenway Square
Apartment M-31
Dover, Delaware 19904

August 2, 1996

Dear Dr. Cunningham:

This is in further reference to your complaint filed with this office on June 25, 1996 against the Delaware Department of Health and Social Services (the Agency). This will also confirm the July 30, 1996 telephone conversation between you and Ms. Marian Myers of our staff. You alleged that the Agency discriminates on the basis of disability by implementing a policy to withhold diagnostic information from parents of disabled preschoolers, and by treating you unfairly concerning your employment.

During your conversation with Ms. Myers, you informed her that your individual employment allegations were being litigated in U.S. District Court, as well as your allegations concerning the Agency information policy. In accordance with OCR procedures, we will not seek resolution of any complaint allegations which are presently being litigated in a court of law. Therefore, we are closing our file on your complaint effective the date of this letter. You may re-file this complaint within

60 days following termination of the proceeding if there has been no decision on the merits or settlement of the complaint allegations. However, if you do re-file your complaint with this office, we ask that you provide the information requested in our July 25, 1996 letter.

Please be advised that 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, which is incorporated by reference in the regulation implementing Section 504 of the Rehabilitation Act of 1973, at 34 C.F.R. § 104.61, prohibits the harassment or intimidation of individuals who file complaints with OCR and those who cooperate with our investigations. The regulation implementing Title II of the ADA, at 28 C.F.R. § 35.134, also prohibits retaliation by a private or public entity against an individual who exercise his or her rights under the ADA, makes a charge, or participates in an investigation or proceeding thereunder.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please do not hesitate to contact Ms. Marian Myers, Equal Opportunity Specialist, at (215) 596-1653.

Sincerely,
/s/
Robert Ford
Compliance Team Leader

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

U.S. Constitution - First Amendment - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution - Fifth Amendment - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Constitution - Fourteenth Amendment - Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

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or other non-academic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

34 CFR § 100.7 (b) Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

34 CFR § 100.7(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judi-

cial proceeding arising thereunder.

34 CFR § 104.4

(b) Discriminatory acts prohibited.

(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual licensing, or other arrangements, on the basis of handicap:

(v) Aid or perpetrate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient program.

34 CFR § 104.61 - The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6 - 100.10 and part 101.

Appendix A to Part 104

Subpart A - General provisions

(5). . .Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality

of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself.

(9) Remedial action. Where there has been a finding of discrimination, § 104.6 requires a recipient to take remedial action to overcome the effects of discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan.

Regulations associated with IDEA

34 CFR § 303.344 Content of an IFSP (Individualized Family Service Plan)

(a) Information about the child's status. (1) The IFSP must include a statement of the child's present levels of physical development (including vision, hearing, and health status), cognitive development, social or emotional development, and adaptive development.

Associated rule - Delaware Family Service Plan Instructions:
The purpose of the IFSP is to identify and organize formal and informal resources to facilitate families' goals for their children

and themselves. Each IFSP is to be centered around the individual child and family and considered a fluid document which evolves and changes as the child and family grow and develop. Procedures for the Individualized Family Service Plan (IFSP) process are contained in the Delaware Part H Program Operations Manual. These should be reviewed prior to the development of the IFSP. The following instructions are to be used in the completion of the IFSP form. . . .

Section 1. Identifying Information
B. Include the child's risk factor (ICD-9) or diagnosis, ISIS number, Medicaid number and/or family insurance company and policy number.

34 CFR § 303.361 **Personnel standards**
(a) As used in this part--
(1) Appropriate professional requirements in the State means entry level requirements that--
(i) Are based on the highest requirements in the State applicable to the profession or discipline in which the person is providing early intervention services; and
(ii) Establish suitable qualifications for personnel providing early intervention services under this part to eligible children and their families who are served by the State, local, and private agencies.

(2) Highest requirements in the State applicable to a specific profession or discipline means

the highest-entry level academic degree needed for any State approved or recognized certification, licensing, registration, or other comparable requirements that apply to that profession or discipline.

(3) Profession or discipline means a specific occupational category that--
(i) Provides early intervention services to children eligible under this part and their families;
(ii) Has been established or designated by the State; and
(iii) Has a required scope of responsibility and degree of supervision.
(4) A State approved or recognized certification, licensing, registration, or other comparable requirements means the requirements that a State legislature either has enacted or has authorized a State Agency to promulgate through rules to establish the entry-level standards for employment in a specific profession or discipline in that State.
(b)(1) Each statewide system must have policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained.

34 CFR § 303.401 Definition of consent
As used in this subpart--
(a) Consent means that--
(1) The parent has been fully

informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;
(2) The parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

34 CFR § 303.404 Parent consent
(a) written parental consent must be obtained before--
(12) Conducting the initial evaluation and assessment of a child under § 303.322; and
(2) Initiating the provision of early intervention services (see § 303.342(e)).
(b) If consent is not given, the public agency shall make reasonable efforts to ensure that the parent--
(1) Is fully aware of the nature of the evaluation and assessment or the services that would be available; and
(2) Understands that the child will not be able to receive the evaluation and assessment or services unless consent is given.

34 CFR § 303.424 Civil action - Any party aggrieved by the findings and decision regarding an administrative complaint has the right to bring a civil

action under 680(1) of the Act.

Lead Agency Procedures for Resolving Complaints

34 CFR § 303.510 Adopting complaint procedures - Each lead agency shall adopt written procedures for--

(a) Resolving any complaint that any public agency is violating a requirement of Part H of the Act or this part by--

(1) Providing for the filing of a complaint with the lead agency; and

(2) At the lead agency's discretion, providing for the filing of a complaint with a public agency and the right to have the lead agency review the public agency's decision on the complaint; and

(b) Informing parents and other interested individuals about the procedures in §§ 303.510 through 303.512.

34 § 303.511 - An organization or individual may file a complaint
An individual or organization may file a written signed complaint under § 303.510. The complaint must include--

(a) A statement that the State has violated a requirement of Part H of the Act or the regulations in this part; and

(b) The facts on which the complaint is based.

34 CFR § 303.512 Minimum State complaint procedures. - Each lead agency shall include the following in its complaint

procedures:

(a) A time limit of 60 calendar days after a complaint is filed under § 303.510(a) to--

(1) Carry out an independent on-site investigation, if the lead agency determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part H of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains--

(i) Findings of fact and conclusions; and

(ii) The reasons for the lead agency's final decision.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the lead agency's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(d) The right of the complainant or the public agency to request the Secretary to review the lead agency's final decision.

Delaware Code

Del C 18 § 6801(7) - "Malpractice" means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient. The standard of skill and care required of every health care provider in rendering professional services or health care to a patient shall be that degree of skill and care ordinarily employed, under similar circumstances, by members of the profession in good standing in the same community or locality, and the use of reasonable care and diligence.

Del C 18 § 6852 - Informed Consent

(a) No recovery of damages based upon a lack of informed consent shall be allowed in any action for malpractice unless:

(1) The injury alleged involved a nonemergency treatment, procedure or surgery; and

(2) The injured party proved by a preponderance of evidence that the health care provider did not supply information regarding such treatment, procedure or surgery to the extent customarily given to patients, or persons authorized to give consent for patients, by other licensed health care providers with similar training and/or experience in the same or similar health care communities as that of the defendant at the time of the treatment, procedure or surgery.

(b) In any action for malpractice, in addition to other defenses

provided by law, it shall be a defense to any allegation that such health care provider treated, examined or otherwise rendered professional care to an injured party without his or her informed consent that:

(1) A person of ordinary intelligence and awareness in a position similar to that of the injured party could reasonably be expected to appreciate and comprehend hazards inherent in such treatment;

(2) The injured party assured the health care provider he or she would undergo the treatment regardless of the risk involved or that he or she did not want to be given the information or any part thereof to which he or she could otherwise be entitled; or

(3) It was reasonable for the health care provider to limit the extent of his ~~or~~ her disclosures of the risks of the treatment, procedure or surgery to the injured party because further disclosures could be expected to affect, adversely and substantially, the injured party's condition, or the outcome of the treatment, procedure or surgery.

Delaware State Merit Rules

19.0100 - Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel

administration because of political or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factors will be prohibited.

20.0330 - In the event the employee is still not satisfied regarding the grievance, he may, within five (5) working days of receipt of the written reply, present a written request for a review of the grievance by the head of the agency (e.g. Cabinet level). The head of the agency or his/her designee shall, within ten (10) working days of receipt of such request, meet and discuss the grievance with the employee and his/her representative, if any, and issue his/her decision to the employee in writing within ten (10) working days of said meeting. (revised June 8, 1991)

20.0410 - Any employee who takes his employment problems outside of the classified service without first attempting to resolve said problems in accordance with the procedures outlined above shall be subject to disciplinary action. However, nothing in this section shall be deemed to abrogate any legal means of redress to the courts, or appropriate State or Federal agencies, or prohibit consultation with a union representative.